No. 06-752

In The

Supreme Court of the United States

ESTATES IN EAGLE RIDGE, LLLP, et al.,

Petitioners,

v.

VALLEY BANK & TRUST,

Respondent.

On Petition For A Writ Of Certiorari To The Colorado Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Have Petitioners presented compelling reasons to grant the Petition where the decision of the Colorado Court of Appeals does not conflict with any decisions of this Court, and where Petitioners do not claim that the decision implicates an important federal question that has not been settled by this Court?

II. Have Petitioners presented compelling reasons to grant the Petition where the record demonstrates that they were aware of, and participated in, the foreclosure proceedings for which they now claim they did not receive notice in accordance with their right to due process of law?

III. Have Petitioners presented compelling reasons to grant the Petition where they seek only to overturn the factual determinations of the Larimer County, Colorado, District Court?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Valley Bank & Trust is a wholly-owned subsidiary of Valley Bancorp, Inc. No publicly-held corporation owns 10% or more of the stock of Valley Bank & Trust.

TABLE OF CONTENTS

	Page
Questions Presented	i
Corporate Disclosure Statement Pursuant to Supreme Court Rule 29.6	ii
Statement of the Case	1
Reasons for Denying the Writ	7
A. The Writ Should Be Denied Because the Decision of the Colorado Court of Appeals Does Not Conflict with Relevant Decisions of this Court.	7
B. The Writ Should Be Denied Because Petitioners Seek to Overturn the Factual Findings of the Larimer County District Court.	10
C. The Writ Should Be Denied Because Further Discovery Will Contradict the Representations That Petitioners Have Made to this Court.	13
Conclusion	14

TABLE OF AUTHORITIES

Page

CASES

Conrad v. Imatani, 724 P.2d 89 (Colo. Ct. App. 1986) 11

Dusenbery v. United States, 534 U.S. 161 (2002) 7

Estates in Eagle Ridge, LLLP v. Valley Bank & Trust, 141 P.3d 838 (Colo. Ct. App. 2005) 6, 7

Jones v. Flowers, 126 S. Ct. 1708 (2006) 8, 10

Little v. Fellman, 837 P.2d 197 (Colo. Ct. App. 1991) 11

Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983) 7

Moreland v. Marwich, Ltd., 665 P.2d 613 (Colo. 1983) 5

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 7

Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988) 7

STATUTES

C.R.S. § 38-38-101 3

C.R.S. § 38-38-105 4

C.R.S. § 38-38-109 13

C.R.S. § 38-38-302 14

STATEMENT OF THE CASE

This case involves two separate summary judgment rulings of the Larimer County, Colorado, District Court. On February 19, 2003, the court ruled that an error in the caption of a court order that authorized a sale under a deed of trust did not create a substantive defect in the foreclosure process. Petitioners are not challenging this ruling. On August 14, 2003, the court ruled that the Public Trustee of Larimer County (the "Public Trustee") and Valley Bank & Trust ("Valley Bank" and "the Bank") had provided adequate notice of the foreclosure proceedings pursuant to the provisions of the deed of trust and Colorado foreclosure statutes and rules.

The Provisions of the Deed of Trust

On November 3, 2000, Petitioner Estates in Eagle Ridge LLLP executed a deed of trust to the Public Trustee of Larimer County for the benefit of Valley Bank to secure a $1,430,193.00 note. The deed of trust purportedly covered more than 200 acres of raw land in Larimer County, Colorado. Petitioners Terry Hamilton and Sharon Hamilton are co-makers of the note. They also pledged ten shares of the capital stock of the North Poudre Irrigation Company as security.

The loan agreement that the parties signed at the same time as the note allowed Valley Bank to advance additional sums up to the face amount of the promissory note to cover monthly interest payments. As of March 30, 2001, Valley Bank had advanced $1,422,553.97 to pay off prior debts and to cover monthly principal and interest payments. But the Bank decided at that time that it should not advance any more money because Estates in

Eagle Ridge had not made any payments of its own on the loan, it had not sold any of the lots from which payments were to be generated for the Bank, and it did not take adequate steps to provide the Bank with the collateral it had promised.

The deed of trust specified the procedure for the notice that Valley Bank would provide to Petitioners if it commenced foreclosure proceedings. It called for the Bank to provide notice by mail to Petitioners at 2629 Redwing Road, Suite 370, Ft. Collins, Colorado 80526, the address shown on the first page of the Deed of Trust for Estates in Eagle Ridge. It also specified the procedure that Petitioners had to follow if they wished to change their address for receiving notice:

> **NOTICES.** Any notice required to be given under this Deed of Trust, including without limitation any notice of default and any notice of sale shall be given in writing, and shall be effective when delivered . . . or, if mailed, when deposited in the United States mail, as first class, certified or registered mail postage prepaid, directed to the addresses shown near the beginning of this Deed of Trust. All copies of notices of foreclosure from the holder of any lien which has priority over this Deed of Trust shall be sent to the Lender's address, as shown near the beginning of this Deed of Trust. Any party may change its address for notices under this Deed of Trust by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address. For notice purposes, Grantor agrees to keep lender informed at all times of Grantor's current address. Unless otherwise provided or required by law, if there is more than one Grantor, any notice given by

> lender to any Grantor is deemed to be notice given to all Grantors.

Although Petitioners thereafter used different letterhead addresses in communications with Valley Bank, they never requested Valley Bank to change its records to show a new address for them in the manner required by deed of trust.

The Foreclosure Process

Valley Bank commenced foreclosure proceedings on July 19, 2001. By this time, Estates in Eagle Ridge was in default by not paying interest on the $1,422,553.97 principal balance for at least four months. As required by C.R.S. § 38-38-101(1)(f), Valley Bank provided the Larimer County Public Trustee with a list of addresses to send copies of the Notice of Election and Demand for Sale, and Notice of Right to Cure and Right to Redeem. The address that Valley Bank provided to the Public Trustee for Estates in Eagle Ridge, Terry Hamilton, and Sharon Hamilton was the 2629 Redwing Road location set out in the deed of trust. The Public Trustee served these materials by first class mail on Petitioners and others. There is no evidence in the record that the copies and notices sent to Estates in Eagle Ridge, Terry Hamilton, and Sharon Hamilton at 2629 Redwing Road, Ft. Collins, Colorado, were returned for insufficient addresses, expiration of forwarding orders, or any other reason.

Colorado law requires a party that seeks foreclosure of a deed of trust to obtain an order authorizing a sale from a court of competent jurisdiction. The court's inquiry is restricted to determining the existence of a default and the absence of issues under the Soldiers' and Sailors' Civil

Relief Act. Valley Bank filed a Motion for Order Authorizing Sale under Rule 120 of the Colorado Rules of Civil Procedure and C.R.S. § 38-38-105 on September 19, 2001, and it sent a copy of the Motion to Estates in Eagle Ridge at the Redwing Road address. Six days later, the Bank filed a Notice regarding Rule 120 Hearing, a Certificate of Mailing and Posting, and a proposed Order Authorizing Sale, and it sent a copy of the Notice of the hearing to Estates in Eagle Ridge at the Redwing Road address. There is no evidence in the record that the copies and notices sent to Estates in Eagle Ridge, Terry Hamilton, and Sharon Hamilton at 2629 Redwing Road, Ft. Collins, Colorado, were returned for insufficient addresses, expiration of forwarding orders, or any other reason.

Petitioners did not respond to the Rule 120 notice, and the Denver District Court entered the Order Authorizing Sale on October 15, 2001. The record establishes, without contradiction, that Estates in Eagle Ridge was in default under the deed of trust on that date because it had failed to pay more than four months of interest on the $1,422,553.97 principal debt. The Bank sent the Order Authorizing Sale to the Public Trustee of Larimer County, and she conducted the Public Trustee Sale on October 31, 2001. This sale date meant that the six-month period of redemption for the property would expire on April 30, 2002.

The Filing and Disposition of this Lawsuit

On April 29, 2002, one day before the period of redemption for the foreclosure expired, Petitioners filed this action. Their complaint attacked the validity of the Order Authorizing Sale that the Denver District Court had

entered on October 15, 2001. Despite the fact that the remedy under Colorado law for an alleged error in the foreclosure process is an equitable extension of the time for redeeming the property, *Moreland v. Marwich, Ltd.*, 665 P.2d 613, 618-19 (Colo. 1983), the complaint sought an invalidation of the entire foreclosure process. Valley Bank filed an answer and counterclaim that explained that the Order Authorizing Sale had a clerical error in its caption that did not affect its validity. It then filed a Motion for Partial Summary Judgment that demonstrated that the Order was legally effective. Petitioners filed a Cross Motion for Summary Judgment that contended that the loan documents required the Rule 120 proceedings to be conducted in Larimer County. They also asserted that they had not obtained notice of the judicial proceedings under Rule 120. By its Order of February 19, 2003, the district court determined that the clerical error which improperly listed the Larimer County District Court on the Order Authorizing Sale was not a "substantive defect in the foreclosure process" and that Valley Bank was authorized to seek the Order from the Denver District Court. The court also determined that a material issue of fact existed regarding the knowledge which Valley Bank had regarding the address of Petitioners.

Valley Bank filed its Second Motion for Partial Summary Judgment on June 18, 2003, to address the notice that it was required to give of the foreclosure proceedings. Valley Bank demonstrated that it had provided notice to Estates in Eagle Ridge at the address established by the deed of trust, and that Estates had not provided a request for change of its address for receiving notices in the manner specified by the deed of trust. Valley Bank also offered evidence by affidavit that it had been unable to

confirm any other address for Estates in Eagle Ridge or Terry Hamilton besides the Redwing Road location. The district court entered an Order Granting Valley Bank & Trust's Second Motion for Partial Summary Judgment on August 14, 2003 (R. 254). The court determined that alternative grounds existed for dismissing the remainder of Petitioners' case, namely: (1) Valley Bank had properly complied with the notice required by the deed of trust and Colorado law by arranging for the mailing of foreclosure documents to the Redwing Road address, (2) Valley Bank had no knowledge, anyway, of any address for Petitioners other than the Redwing Road address listed in the deed of trust, and (3) Colorado law permitted notice of foreclosure proceedings to be sent to the address listed in a deed of trust despite Petitioners' assertion that Valley Bank knew of a new address.

The Court of Appeals affirmed the two summary judgment rulings. As to the second summary judgment order of August 14, 2003, that Court affirmed the first alternate ground offered by the trial court – *viz.*, that Valley Bank had given proper notice pursuant to the deed of trust and Colorado statutes. The Court of Appeals concluded that it was not necessary to reach the two alternate grounds. *Estates in Eagle Ridge, LLLP v. Valley Bank & Trust*, 141 P.3d 838, 841 (Colo. Ct. App. 2005). It determined that Petitioners had agreed with Valley Bank that all notices would be provided to the Redwing Road address unless Petitioners provided a different address in writing, and that Petitioners had not provided a notice pursuant to the deed of trust to change their address. *Id.* at 842. The Court noted that this provision was substantially similar to the notice clause contained in the deed of trust approved by the Colorado State Real Estate

Commission. (*Id.*) It held that it was proper under due process of law to hold Petitioners to the agreement they had made with Valley Bank. *Id.* at 843.

REASONS FOR DENYING THE WRIT

A. The Writ Should Be Denied Because the Decision of the Colorado Court of Appeals Does Not Conflict with Relevant Decisions of this Court.

Due process does not require that a property owner receive actual notice of a proceedings by the government to take his or her property. *Dusenbery v. United States*, 534 U.S. 161, 170 (2002). Rather, due process requires the government to provide notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Notice by mail will provide notice that is consistent with due process. *Dusenbery, supra*, at 169; *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 490 (1988); *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798 (1983); *Mullane, supra*, at 318-19.

The Colorado Court of Appeals concluded that the procedures for notice that Valley Bank and Petitioners had agreed upon in the deed of trust conformed to due process. It determined that it was reasonable to expect parties to a commercial contract to perform the obligations set out in their contract, and that, had Petitioners wanted the Bank to mail notices to them at a different address, they should have simply requested such a change in the manner spelled out in the deed of trust.

Petitioners contend that the decision of the Colorado Court of Appeals "contradicts" the later decision of this Court in *Jones v. Flowers*, 126 S. Ct. 1708 (2006). (Petition at 9, 10) They assert that a form of notice sanctioned by state statutes is constitutionally insufficient where a state official knows that the notice has not been received. They argue that Valley Bank knew that the address provided in the deed of trust was no longer valid, and that it was a violation of due process for it to fail to provide the Public Trustee with updated addresses. (Petition at 10-11)

Petitioners' arguments are deficient because they are not supported by the record. There are two serious factual flaws in their contentions.

First, there is no evidence in the record to demonstrate that the notices pertaining to the foreclosure that were mailed by the Public Trustee to Estates in Eagle Ridge, Terry Hamiilton, and Sharon Hamilton at the 2629 Redwing Road address were returned to the Public Trustee for any reason. Nor is there evidence in the record to demonstrate that the notices pertaining to the Rule 120 proceedings that were mailed by Sherman & Howard LLC to Estates in Eagle Ridge, Terry Hamiilton, and Sharon Hamilton at the 2629 Redwing Road address were returned to the law firm for any reason. The fact that a party can no longer be physically found for the service of process at a given address does not mean that the party is no longer receiving its mail. By contrast, the record in *Jones, supra*, demonstrated that the Arkansas Commissioner of State Lands attempted to provide notice by mail to Mr. Jones on two separate occasions, and that each letter was returned unopened and marked "unclaimed." This Court held that the information provided by the returned,

unclaimed envelopes required additional steps to effect notice.

Second, the record demonstrates that Petitioners were fully aware of the foreclosure proceedings. After the Larimer County District Court entered the second summary judgment against Petitioners on August 14, 2003, they filed numerous documents to support a motion for reconsideration. One of these documents was an "Intent to Cure" that Petitioner Terry Hamilton sent to the Public Trustee on September 17, 2001. This communication included the Public Trustee Sale Number that had been assigned by the Public Trustee to the foreclosure, stated an intent "to cure the default on the referenced Public Trustee foreclosure," and requested information on the total costs that had to be paid to effect a cure of the default. Mr. Hamilton's communication also provided a telephone number and an address on Hood Lane (where Valley Bank had previously attempted to serve him) for further communications. Another document that was filed by Petitioners with the court was a letter from Mr. Hamilton to Valley Bank dated September 13, 2001, that stated:

> It is my understanding that said real property will be sold at public auction by the Public Trustee on September 21, 2001, to cure the indebtedness.

(The sale date was ultimately extended to October 30, 2001.) These two documents demonstrate that Terry Hamilton, for himself and his spouse, and as registered agent for Estates in Eagle Ridge, was fully aware of the foreclosure proceedings and that he had established communications with the Public Trustee about the foreclosure sale date and a cure of the default under the note. These documents also contradict Petitioners' insinuation

that the Public Trustee knew that they had received no notice of the foreclosure proceedings, and that she violated their due process rights because she failed to investigate other forms of notice.

Petitioners have failed to demonstrate that the decision of the Colorado Court of Appeals conflicts with *Jones v. Flowers* or other relevant decisions of this Court. Their petition for a writ of certiorari should be denied for this reason.

B. The Writ Should Be Denied Because Petitioners Seek to Overturn the Factual Findings of the Larimer County District Court.

Petitioners contend that Valley Bank knew of other valid addresses at which notices of the foreclosure proceedings could be sent. (Petition at 6, 8, 10). They seek to overturn the factual finding of the Larimer County District Court that "[t]he Bank had no knowledge of the address at which Notice of foreclosure proceedings could be sent to Plaintiff Estates in Eagle Ridge LLLP, once it vacated the address listed in the Deed of Trust." The Colorado Court of Appeals found it unnecessary to review this factual determination, and it remains binding.

Petitioners' arguments about other addresses where notice should have been sent rest upon two errors. First, they rely upon documents from their files that they submitted to the trial court *after* it had already entered summary judgment against them. All of their arguments about the 541 Hood Lane address rely upon these documents. In refusing to overturn the summary judgment, the trial court presumably applied longstanding Colorado precedent that newly-submitted documents should not be

considered in a motion for reconsideration in the absence of a showing that they were "newly discovered." *Conrad v. Imatani*, 724 P.2d 89, 94 (Colo. Ct. App. 1986); *see also Little v. Fellman*, 837 P.2d 197, 203 (Colo. Ct. App. 1991). The court of appeals refused to overturn this determination.

Second, Petitioners ignore the record that the trial court relied upon in granting summary judgment. These facts show that, in June 2001, Valley Bank and Terry Hamilton were joined as defendants in a separate lawsuit in Weld County, Colorado. The plaintiff in that action contended that it had a prior security interest in the ten shares of the capital stock of the North Poudre Irrigation Company that Terry Hamilton and Sharon Hamilton had pledged to Valley Bank. Valley Bank decided to assert a counterclaim against Terry Hamilton and third-party claims against Estates in Eagle Ridge and Sharon Hamilton as part of this separate lawsuit. Because Rule 4 of the Colorado Rules of Civil Procedure required personal service of the third-party complaints, Valley Bank had to find Sharon Hamilton and Terry Hamilton, in his capacity as the registered agent for Estates in Eagle Ridge. The Bank first attempted service at 2629 Redwing Road, the address given in the deed of trust. The process server determined in August that Estates had vacated these offices a few months beforehand. Valley Bank then conducted an internet search to locate Petitioner Terry D. Hamilton, the registered agent of Estates. An address in Greeley, Colorado, turned out to be an unproductive lead. Valley Bank also attempted to serve Mr. Hamilton at 541 Hood Lane, Fort Collins, the address that Mr. Hamilton had used in the letterhead of correspondence that he had previously sent to the Bank. After numerous attempts, the process server was unsuccessful in locating him or

confirming that he lived there. In early September, Valley Bank attempted service at an address in Modesto, California, that Mr. and Mrs. Hamilton had listed in the past. The Bank's process server was able to locate only Sharon Hamilton at that address. As other attempts at serving Mr. Hamilton and Estates in Eagle Ridge had failed, Valley Bank requested this process server to leave a summons for Terry Hamilton with Sharon Hamilton. Valley Bank concluded that, if Mr. Hamilton actually resided at that address, service on his spouse would be sufficient service on him under Rule 4(e)(1) of the Colorado Rules of Civil Procedure. Its assumption was wrong. Mr. Hamilton later testified that he did not reside at that address, and, accordingly, service upon him and Estates in Eagle Ridge at that address was invalid. In fact, he later filed pleadings that gave his personal address as 1112 Oak Ridge Drive, Fort Collins, Colorado. By the time he disclosed this address, the Rule 120 proceedings had been concluded, and the foreclosure sale had been conducted.

This evidence convinced the trial court to grant summary judgment in Valley Bank's favor, and to conclude that the Bank had no knowledge of any other addresses at which notice of foreclosure proceedings should be sent. It served as the basis for the Court of Appeals' conclusion that Petitioners had never changed their address in the manner required by the deed of trust. Petitioners' position would require this Court to review and overturn the factual findings of the Larimer County District Court and Court of Appeals. The Petition should be denied for this reason also.

C. The Writ Should Be Denied Because Further Discovery Will Contradict the Representations That Petitioners Have Made to this Court.

Petitioners have represented that "[n]one of the petitioners ever received notice of the public trustee's sale or of their rights to redemption until after the property had been sold and the period of redemption had expired." (Petition at 4). As the discussion under Section A, above, shows, the fallacy of this contention is demonstrated by Mr. Hamilton's communications with the Public Trustee about the sale, his knowledge of the date set for the foreclosure sale, and his declaration of an intent to cure the default. If certiorari review of this case were to result in a remand for further proceedings, discovery would undermine Petitioners' representation further. For example, a subpoena for the records of the Public Trustee would yield the following:

- A September 17, 2001, fax of the Notice of Public Trustee's Sale for the property to Terry Hamilton from Leslie of the office of the Public Trustee. This fax informed Mr. Hamilton of the date of the foreclosure sale and was sent two days before the original sale date of September 19, 2001. The sale date was continued, ultimately, to October 30, 2001. An announcement of the new date for a postponed sale is made publicly by the Public Trustee at the time of the postponed sale. C.R.S. § 38-38-109(1). This letter demonstrates that Mr. Hamilton knew of the original sale date for the property, and had the opportunity to determine the date to which the sale was continued.

- A November 16, 2001, fax of the dollar amounts required to redeem the property to Terry Hamilton from Leslie at the office of the Public

> Trustee. The fax was sent after the sale date of October 30, 2001, and before the period of redemption expired on April 30, 2002. Redemption amounts are provided when a party declares an intent to redeem property after a foreclosure sale. C.R.S. §38-38-302(1.5). This fax demonstrates that Mr. Hamilton had declared an intent to redeem the property in November 2001.

Because of the precedural posture of this case, as well as the need for additional discovery to test Petitioners' claim of ignorance of the foreclosure and of their right to redeem, the writ should be denied.

CONCLUSION

If Petitioners wanted notice of the foreclosure proceedings to be sent somewhere else, they should have followed the procedure that they had agreed to in the deed of trust. But Petitioners knew about the foreclosure sale and that they were in communication with the Public Trustee about it and their rights to cure and to redeem. Their claims regarding a violation of their due process rights are no more than an attempt to overturn factual determinations of the Colorado courts. Their petition should be denied.

Dated this 26th day of December 2006.

Respectfully submitted,

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